

have yet to pay the sum. Although it is neither within the sale agreement, nor within the guarantee agreement, nevertheless, as alleged, it is a mutual debt due from the appellants. This is a sort of situation contemplated in the judgment of Morris L.J. in *Hanak v. Green (supra)* in which his Lordship said could be set-off because the appellants should give credit for it.

(2) As regards the sum of \$6,545.30, there is also no dispute that this sum was incurred by the respondents in connection with the shipment of mawa seeds and for which the appellant agreed under the sale agreement, to reimburse; and

(3) As regards the sum of \$223,756.00, this is the respondents' claim in respect of the balance of the price of mawa seeds supplied to the appellants, which, according to the respondents' allegation, is still owing and remains to be paid. Clearly this claim is based on the sale agreement.

Unless the sale agreement under which the two sums in (2) and (3) above are claimed and the guarantee agreement under which the appellants' suit for \$350,000/- is based are treated as being clearly connected with each other or as one cause or matter, these sums cannot constitute a defence of set-off, but only as a counterclaim.

In our judgment, these two agreements must be treated as inter-connected and constituting one cause or matter; the guarantee agreement being complementary to the sale agreement. The object of the sale agreement is for the purchase and supply of mawa coconut seeds by the respondents to the appellants. Under its clause 5 the respondents are required to ship the seeds to a destination specified by the appellants and under clause 6 they are entitled to be reimbursed for the expenses incurred in connection with the shipment. To enable the shipment to be done, the respondents needed money to provide a bank guarantee required by the Royal Malaysian Customs. But the sale agreement made no provision regarding the money and bank guarantee. It is obvious that unless the guarantee were furnished the sale agreement could not be performed because the Customs would not allow the shipment. In such a case the result would be that the respondents would not be able to ship the mawa seeds and the appellants would not be able to receive them. In

A our view, this is a sort of omission which, if the parties had thought of when they entered into the sale agreement, they would have included it in the sale agreement. In fact this is clearly recognised by the appellants themselves when they said in their letters relating to the payment of the sum of \$350,000/- that the money was paid as a deposit and that it was paid "to meet the requirement of the Royal Malaysian Customs in the performance of the mawa seednuts Supply Agreement dated January 30, 1981." Thus the advances by the appellants and the receipt by the respondents of this sum, in our judgment, are part of the Sale agreement. The signing of the Guarantee agreement which refers to this sum does not render it to be a separate agreement nor an independant transaction; it being supplemental to the former.

D For the reasons given above we dismiss the appeal with costs. The deposit must be paid to the respondents on account of taxed costs.

Appeal dismissed.

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Solicitors: *Shearn Delamore & Co.; Choong Yik Son & Co.*

F MOSBERT BERHAD (IN LIQUIDATION) v. CHATIB BIN KARI

[F.C. (Salleh Abas L.P., Wan Suleiman & Hashim Yeop A. Sani F.JJ.) September 4 & October 8, 1984]
[Johore Bahru — Federal Court Civil Appeal No. 2 of 1984]

G

Land Law — Housing estate — Purchase of Lot — Purchase price paid in full — Transfer not effected as subdivision not completed — Sale of land by vendors — Caveat by purchaser — Application to remove caveat

H In this case the vendors who were originally a partnership agreed to sell a piece of land part of a housing estate to the respondent. The respondent paid the deposit and also the balance of the purchase price by instalments. Under Clause 4 of the agreement the respondent was entitled to a transfer of the property when the new document of title was issued by the Land office. In this case subdivision was not completed and the respondent had, upon completion of the payment of the purchase price, an option to require a deed of assignment and an irrevocable power of attorney to be executed by the vendors in his favour. The respondent preferred to wait for sub-division. In the meantime the partnership was turned into a private limited liability company and then subsequently into a public company, the appellants. Whilst the purchasers of the proposed subdivided lots were waiting for their titles the appellant company failed in its business. A winding up order was

made and the Official Receiver was made the Liquidator and Receiver for the appellant company. During the course of liquidation the Official Receiver sold the land to a private company, Jet Age. Both the Official Receiver and Jet Age were aware that there were a number of purchasers who bought the land on the basis of the proposed subdivision lots. Jet Age paid for the land but were unable to effect registration of the land into their name, because the respondent had lodged a caveat on the land. The respondent was given a notice to remove the caveat and he filed an originating summons for leave to commence a civil suit against the appellants and for an order that the caveat be extended till the suit was finally disposed of. A consent court order was obtained for the extension of the caveat. Subsequently however the Official Receiver applied to have the consent order set aside and to dismiss the originating summons. The Judge of the High Court who heard the case allowed the application for leave to commence the civil suit and also made an order extending the caveat until final determination of the suit (see [1984] 2 M.L.J. 67). The appellant appealed against the ruling on the extension of the caveat.

Held: (1) the law which has been consistently followed by the court in this country is that a purchaser of land who has paid the purchase price, until registered as the legal owner acquires an equitable interest in it;

(2) Jet Age in this case also acquired an equitable interest in the land when they paid the purchase price but as the respondent's rights were earlier in time they have better protection than that of Jet Age which was later in time;

(3) the learned trial judge was therefore correct in extending the caveat of the respondent until final determination of the suit.

FEDERAL COURT.

P. Suppiah for the appellant.
Julie Lim for the respondent.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): These two appeals were heard together and the facts are as follows:

Two men named Amos William Dawe (hereinafter referred to as "Dawe") and Lim Chong Ah (hereinafter referred to as "Lim") were a partnership trading under the name of Sharikat Mosbert (hereinafter referred to as "the Sharikat").

Dawe and Lim owned a piece of land in the Mukim of Plentong in the District of Johore Bahru. It was held under Johore Grant No. 72 for Lot 83 and the total area was 113 acres 2 roods and 20 poles. Trading under the name of the Sharikat Dawe and Lim decided to develop the land into a

A housing estate to be known as "Taman Chendrakaseh". A lay-out plan for the subdivision of the land into several lots was prepared with a view to obtaining separate titles for them. Before the subdivision was approved by the authorities the proposed subdivided lots, numbering about 300 altogether were sold to members of the public. Chatib bin Kari and Farland @ Firlan bin Sirin, the two respondents in these two appeals, were amongst those who purchased the proposed subdivided lots. Chatib's lot is lot No. 86, whilst that of Farland's is lot No. 62. The area of each of these lots is 6,000 sq. ft.

Chatib purchased his lot for \$1,500/- by an agreement dated April 19, 1967 which he entered into with Dawe and Lim. Chatib paid 10% as down-payment and the balance by monthly instalments of \$25/- a month. By March 27, 1971 he completely paid up the balance. Like Chatib, Farland too bought his lot by an agreement. But in his case the price was \$1,850/- and the agreement was dated April 13, 1967. He paid 10% as down-payment and completed paying the balance by monthly instalments of \$30/- a month.

Whilst Chatib and Farland were paying their monthly instalments, Dawe and Lim turned the Sharikat into a private limited liability company and called it Mosbert Enterprise Sdn. Bhd. (in this judgment referred to as "the Enterprise"). Dawe became the chairman of the Enterprise whilst Lim its managing director. With the formation of the Enterprise Dawe and Lim transferred the land the whole under-taking relating to Taman Chendrakaseh to this company. Subsequently, Dawe and Lim formed a public company, called Mosbert Bhd., which is the appellant company in these two appeals. Dawe was its managing director and Lim its executive director. Once again the land in question and the Taman Chendrakaseh project changed ownership. Thus the appellant company became vested with the title to the land with responsibilities to develop it into the housing estate as envisaged by Dawe and Lim.

In the meantime whilst the purchasers of the proposed subdivided lots were waiting for their titles, the appellant company failed in its business. The result was that on January 12, 1977 Johore Bahru High Court issued a winding up order and by another order dated June 21, 1977 the court appointed the Official Receiver as the Liquidator and Receiver for the appellant company. During the course of the liquidation the Official Receiver sold the

land in question to a private company called Jet Age Construction Sdn. Bhd. (in this judgment referred to as "Jet Age") for a total sum of \$2,005,750/-. A sale and purchase agreement was signed on April 1, 1981 by the Official Receiver and Jet Age and on that date Jet Age paid 10% of the price and paid the balance on March 29, 1982, i.e. about a year later.

Both the Official Receiver and Jet Age were aware that there were a number of purchasers who bought the land on the basis of the proposed subdivided lots. The sale and purchase agreement between the Official Receiver and Jet Age made provisions (see clauses 3, 4 and 5) to the effect that Jet Age had at its own expense to deal direct with those purchasers with a view to removing the encumbrances and settling whatever rights or interests they might have in the land. It is also provided that if Jet Age was unable to settle these prior rights and interests within a year, Jet Age was entitled to exercise an option of either withdrawing from the purchase, in which case the Official Receiver must refund the 10% deposit which Jet Age paid on the signing of the agreement or proceeding with the purchase in which case Jet Age had to pay the balance to the Official Receiver and take the responsibilities of dealing direct with those encumbrances of prior rights and interests of people, like Chatib and Farland. Since Jet Age paid the balance almost exactly one year after the date of their sale and purchase agreement it is clear that Jet Age had chosen the second option, i.e. to buy the land with all its encumbrances.

Having fully paid for the land, Jet Age were given the issue document of title, but registration of the transfer into their name could not be effected because Chatib and Farland, presumably on becoming aware that the land was sold to Jet Age, lodged caveats on September 29, 1982 and October 7, 1982 respectively in order to protect their interests. Incidentally Jet Age also filed their caveat on March 26, 1983.

Steps were taken to have the caveats by Chatib and Farland removed and so on August 16, 1983 Chatib and Farland received a notice requiring them to remove those caveats within one month of the date. As a result they filed an Originating Summons in the Johore Bahru High Court asking, *inter alia*, for leave to commence a civil suit against the appellant company as regards the proposed subdivided lots Nos. 83 and 62 and in addition

A thereto for an order that their caveats be extended until the suit for which leave was applied for would be finally disposed of.

B On September 7, both Chatib and Farland obtained a consent court order for the extension of their respective caveats until the final disposal of the Originating Summons; Mr. Lee Yee Kuang, the Senior Assistant Official Receiver who appeared on that date on behalf of the appellant company having agreed to the order. However, subsequently on October 29, 1983 the Official Receiver through his solicitor M/s. Suppiah and Singh C filed a Summons-in-Chambers applying to set aside the consent order and to dismiss Chatib's and Farland's Originating Summons.

D On November 29, 1983, after a long hearing, Shankar J. allowed Chatib's application for leave to commence a civil suit against the appellant company. The learned judge also made an order extending Chatib's caveat until final determination of the suit. The suit (Civil Suit No. 684 of 1983) was filed on or about December 27, 1983. E Farland who obtained a similar order from the learned judge on March 19, 1984 filed his civil suit (Civil Suit No. 187 of 1984) on or about March 14, 1984.

F The appellant company accepted the learned judge's ruling on the granting of leave to commence civil suits but were dissatisfied with his ruling on the extension of the caveats. They thus appeal against that part of the learned judge's decision.

G Mr. Suppiah who appeared for the appellant company submitted to us that because the whole land was sold to Jet Age, Chatib's and Farland's caveats which relate only to 12,000 sq. ft. — a very small and insignificant area as compared to more than 113 acres which Jet Age purchased — should H be removed as their interests are only contractual and therefore could be satisfied with damages. He then listed out a number of points to show that Jet Age's interests are more worthy of protection than those of Chatib and Farland.

I It is, however, not necessary for us to deal with every one of those points, because most of them were irrelevant any way. In our view the nature of Chatib's and Farland's interest is of paramount importance in deciding these appeals. Are they merely contractual as submitted by Mr. Suppiah, or are they equitable, as having arisen

from the respective sale and purchase agreements which they signed with Dawe and Lim? In our judgment there can be no doubt that their interests in the land despite the smallness in terms of area were not merely contractual but also equitable in nature and therefore caveatable under section 323 (1) of the National Land Code. The law which had been consistently followed by the court in this country is that a purchaser of land who has paid the purchase price, until registered as the legal owner, acquires an equitable interest in it. It may well be that the proposed subdivided lots which they purchased did not have the legal status of being separate pieces of land until legally subdivided; nevertheless that fact does not prevent these purchasers from acquiring equitable interests to the extent of the area they had purchased. By ignoring the proposed subdivided lots as having had no existence, everyone of these purchasers was in law beneficially entitled to be registered as a co-proprietor to the extent of the area purchased, if they so wished. Indeed the sale and purchase agreements which Chatib and Farland signed were in fact going further. Clause 4 made a provision to the effect that upon paying the whole of the purchase price, Chatib and Farland or their nominees were entitled to be registered as owners if the separate new titles were issued by the Land Office. However, in the event that no such new titles were issued and purchase price having been fully paid up, Chatib and Farland were entitled to a Deed of Assignment and an irrevocable Power of Attorney to be executed in their favour entitling them to deal with their interests in the land as if they were the absolute owners.

It is also true that Chatib and Farland only signed their purchase agreements with the original owners, namely Dawe and Lim and that they were not parties to the two transfers of the legal title to the land, first to the Enterprise and then secondly to the appellant company. But this fact is not the reason to ignore, or to bring an end to, Chatib's and Farland's equitable interests, because the transferees i.e. the Enterprise and the appellant company, being successors-in-title took the legal interest in the land specifically subject to the prior equities. In the first place in the sale and purchase agreement between Chatib and Farland on the one hand and Dawe and Lim, the original owners, on the other, the parties agreed that these agreements bound their assigns and successors in title. The preamble and clause 13 of the agreement refer to Dawe and Lim as "the Vendors" which term is defined to include —

A "their personal representatives successors-in-title and assigns".

B It thus becomes clear that by virtue of the preamble and clause 13, the obligations contained in the agreement were not intended to last only at the level of the original parties to the agreement, but to enure to whoever are the legal owners of the land until the obligations therein are performed. Failure on the part of Chatib and Farland to obtain deeds of assignment and irrevocable power of attorney when they had fully paid up the purchase price in 1971 does not affect the nature nor diminish or extinguish their interests at all. These are their rights and it is entirely up to them whether or not they wished to have these or either of these instruments executed in their favour. On the other hand what about the failure of the appellant company as successors-in-title to execute these documents? In our view, Chatib's and Farland's equitable interests in the land continue unaffected and their equities did not depend upon them.

E In the second place, every transfer of legal title to the land from one owner to another beginning with Dawe and Lim to the Enterprise and from the latter to the appellant company was made with an express recognition of Chatib's and Farland's equitable interests and meticulous care was taken by the parties to preserve these interests. The sale and purchase agreement dated September 24, 1968 between the Enterprise and the appellant company, for example recited that the latter as the purchasers —

F "have agreed to take over and assume responsibility for the liabilities of the vendors (the Enterprise) amounting to . . . \$578,000/- and for the transfer as set out in the third schedule hereto."

Clause 5 repeats this recital as follows:

H "The purchasers (the appellant company) should take over and discharge all liabilities of the Vendors (the Enterprise) and transfer the subdivided lots as set out in the third schedule hereto and in respect of contracts with the customers or licensees not herein specifically referred to but relating solely to the sale of the sub-divided lots of the properties referred to in the first schedule hereto."

I It is therefore clear beyond doubt that this agreement was intended by the parties to benefit people like Chatib and Farland who had purchased the proposed sublots from Dawe and Lim.

Normally, Chatib and Farland, being strangers to this agreement cannot sue on this agreement although it is for their benefit unless they can show that equitably they were in fact brought into contractual relationship by subsequent conduct. It is not disputed that Chatib and Farland paid their purchase price instalments to the appellant company. At first the instalments were paid to Allen and Gledhill, the solicitors, who drafted the sale and purchase agreement, then to the "Sharikat", then to Mosbert Investment and Development Ltd., presumably one of the companies in the notorious Mosbert group, and finally in late 1969 and throughout 1970 and 1971 to the appellant company. The acceptance of these payments by the appellant company brought them into legal relationship which estops them from denying Chatib's and Farland's interests. Not only that, even the Official Receiver himself who managed the appellant company also recognised these rights. (See clauses 3, 4 & 5 of the agreement between the appellant company and Jet Age on April 1, 1981).

Thus in our view the rights and interests which Chatib and Farland have in the land are beyond any challenge. Those have been in existence long before Jet Age came up the scene to buy the land and bought over the rights and interests of the purchasers of the proposed subdivided lots. The fact that Jet Age's interest is bigger in that they purchased the whole land instead of a few small portions of it as did Chatib and Farland does not mean that they can ignore and get over these rights and interests. Mr. Suppiah's submission seems to us to be that priority should be given to Jet Age because their interest is bigger than Chatib's and Farland's. With respect, we cannot agree. Our law gives protection to all irrespective of size, be they big or small. What the law looks for is the nature of the rights and interests which the parties seek to protect. In this case can the Official Receiver show us that Jet Age's interest is more worthy of protection than those of Chatib and Farland? Yet all that Mr. Suppiah could tell us is that Jet Age had spent a vast sum of money to purchase the land and that they need the land now in order to develop it. Surely Chatib and Farland could similarly say that they too had sacrificed a lot in order to raise money to pay for the land from their hard earned money. They need the land for building their own home. These are economic and commercial considerations which are not relevant for the determination of the present appeal.

A Jet Age was not compelled by anyone to purchase this land. They knew that there are encumbrances on this land. They bought it subject to these encumbrances with an expectation that the owners of the encumbrances would release their rights and interests. Besides, their sale and purchase agreement was even weighted in their favour because Jet Age was allowed to withdraw from the deal if they so wished. Contrary to that option they chose to proceed with the purchase and paid the whole purchase price to the Official Receiver in the hope that the owners of the encumbrances would give in. Finding that they are unable to purchase the encumbrances, they came to court using the Official Receiver's name requiring the court to order the removal of the caveats lodged by the owners of the encumbrances.

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D Now both Chatib and Farland as owners of encumbrances as well as Jet Age acquired equitable rights in respect of the land by virtue of their separate sale and purchase agreements. Chatib's and Farland's rights being earlier in time have better protection than that of Jet Age which is later in time. We therefore see no merit in these appeals. We remain unpersuaded by the appellant's submission to interfere with the learned judge's order to let Chatib's and Farland's caveats remain until final determination of the suits (C.S. 684/83 and C.S. 187/84) which they brought against the appellant company. The appeals are therefore dismissed with costs and the deposits should be paid to the respondents on account of taxed costs.

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G Before we conclude this judgments we feel bound to make a few observations relating to certain matters revealed in these appeals. The learned judge has already expressed his observations regarding the conduct of the firm of solicitors, M/s. Suppiah & Singh, who acted for both Jet Age, the purchaser, and the Official Receiver, the vendor. We wholeheartedly agreed with the observations and we say no more on this matter. H But what we wish to express here is that we do not understand why the Official Receiver should bind the appellant company to appoint this firm of solicitors to act on the appellant company's behalf. This is spelt out in clause 6 of the agreement between the Official Receiver and Jet Age as follows: I

"6. The Vendor hereby appoints and instructs Messrs. Suppiah & Singh, solicitors for the Purchasers, as his agent for the purpose of taking such action as may be necessary in the name of the Vendor in connection with the said Land and in particular to do the following acts and things:

- (a) to negotiate and settle with all the individual purchasers of the said Land and other persons who had caveated the said Land and for this purpose take such Court proceedings as may be necessary, the cost of which is to be borne solely by the Purchasers;
- (b) to defend any action brought by any one against the Vendor in matters connected with and arising out of the said Land;
- (c) to deal with the State Government on all matters connected with the said Land;
- (d) to do such other act or thing as may be necessary for the purpose of completing the sale."

The Official Receiver should have foreseen the likelihood of conflict of interests between the appellant company as the vendor and Jet Age as the purchaser. The matter is more serious when M/s. Suppiah & Singh, the two gentlemen who are partners of the firm of solicitors concerned are also the shareholders of Jet Age.

Under the sale and purchase agreement the problem of getting rid of the encumbrances is the responsibility of Jet Age at whose expense these encumbrances had to be negotiated and settled. We do not see nor comprehend any logic why the Official Receiver should agree to lend the appellant company's name in this firm of solicitors who obviously acted on behalf of Jet Age to take up the proceedings to remove Chatib's and Farland's caveats through successive stages which finally reached us in the present appeals, especially when the appellant company, having received the full purchase price and done what was to be done under the agreement, i.e. giving issue document of title to Jet Age, has no more interest in the land. To show that the Official Receiver is indifferent to these appeals is that no official from this Department was present whilst the appeals were being argued before us. And to show that the present proceedings were in essence carried on at the instance of Jet Age and M/s. Suppiah & Singh is clearly demonstrated by the incident relating to the consent judgment (*supra*) dated September 7, 1983. It is recalled that on that date Mr. Lee Yee Kuang, a Senior Assistant Official Receiver, who appeared on behalf of the Official Receiver — M/s. Suppiah and Singh being absent — agreed to Chatib's and Farland's application to have their caveats extended to a certain date. A consent order was therefore recorded. One would expect that this Consent Order should be honoured and accepted by the Official Receiver on whose behalf this officer had consented to. However, contrary to that expectation on November 2,

A 1983 M/s. Suppiah and Singh acting in the name of the Official Receiver filed a Summons-in-Chambers to set aside the Consent Order.

B It is really sad that the Official Receiver should allow his name to be used in this way as what happened in this case tends to erode public confidence in the competence of his department. It may well be that he could not foresee this situation and the possibility of conflict of interests when he agreed to be bound by clause 6 of the agreement quoted above. We hope that C this is an exceptional case.

Appeals dismissed.

Solicitors: *Suppiah & Singh; H. H. Long & Co.*

DAVID HEY v. NEW KOK ANN REALTY SDN. BHD.

E [F.C. (Salleh Abas L.P., Wan Suleiman & Hashim Yeop A. Sani F. JJ.) September 4 & October 13, 1984]
[Johore Bahru — Federal Court Civil Appeal No. 7 of 1984]

F *Company Law — Transfer of shares — Refusal of directors to register transfer — Allegation of unreasonable delay — Need to comply with Guidelines for the Regulation of Assets, Mergers and Take-overs — Companies Act, 1965, ss. 105 & 162.*

G In this case the appellant had obtained a transfer to himself of 10,000 shares in the respondent company from the First Nominees Pte. Ltd. He applied on June 12 1982 for the registration of the transfer but he received a reply in September 1982 that the Board of Directors of the company had declined to register the transfer. The appellant applied for rectification of the register of members of the company. It was alleged that the Directors in refusing to register the transfer had not exercised their discretion reasonably and in good faith and that in any event their discretion had been lost by unreasonable delay because they took more than 3½ months to send the notice of refusal to him contrary to the requirements of section 105 of the Companies Act. One of the reasons for the delayed refusal alleged by the respondent was because of the need to obtain the approval of the Foreign Investment Committee in accordance with the Guidelines for the Regulation of Assets, Mergers and Take overs.

I **Held:** non-compliance with the requirements of the Guidelines can obviously have adverse consequences especially to a private company such as the respondent company, so that the exercise of the discretion by the directors in refusing to rectify the register was in the circumstances something the learned trial judge rightly declined from interfering with.